IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
WHEELING DIVISION

CHRISTINA M. FANASE, individually and as Beneficiary of a certain life insurance policy of DEBBILOU SWABADO, deceased,

Plaintiff,

v.

LIBERTY LIFE ASSURANCE COMPANY OF BOSTON,

Defendant.

C.A. No.: 5:10-cv-00092-FPS

DEFENDANT'S REPLY TO PLAINTIFF'S MEMORANDUM IN RESPONSE TO DEFENDANT'S MOTIONS TO DISMISS AND TO STRIKE

In Plaintiff's memorandum (Dkt. No. 11) in response to Defendant's motions to dismiss (Dkt No. 8) and to strike (Dkt. No. 9), Plaintiff writes as follows:

> [Plaintiff], in all candor to the Court, cannot now maintain some of the stated causes of action in her complaint. Nor can she present a proper argument to allow her seek extra-contractual damages beyond what the ERISA statute provides.
>
> However, she can and she must be permitted as a beneficiary to the plan to 'recover benefits due to [her] under the terms of [the] plan, to enforce [her] rights under the terms of the plan, or to clarify [her] rights to future benefits under the terms of the plan.' 29 U.S.C.A. § 1132 (a)(1)(B).

(Plaintiff's Opposition Memorandum, Dkt. No. 11, at p. 2). Thus, it appears Plaintiff concedes to all the relief sought by Defendant's motions except to the extent Defendant seeks dismissal of the Complaint with prejudice on the basis of the contractual limitation of actions provision in the Policy that controls Plaintiff's demand for life insurance benefits.

Defendant believes it has a meritorious defense to the Complaint, even re-characterized as a claim pursuant to 29 U.S.C. § 1132(a)(1)(B) of ERISA, on the basis of the contractual limitations provision. Among other grounds, the terms of the Policy – including the limitations provision – were approved by the regulating state agency in the year 2000. Nevertheless, it appears resolution of this defense will not be appropriate within the evidentiary confines that normally apply to a motion to dismiss.

Accordingly, Defendant modifies the relief requested in its pending motions, as follows:

1. Defendant requests that the Court grant Defendant's motion to strike Plaintiff's demands for extra-contractual damages and for trial by jury (Dkt. No. 9), on the ground that Plaintiff concedes such relief is unavailable to her under ERISA as a matter of law.

2. Defendant requests that the Court grant that portion of Defendant's motion to dismiss regarding Plaintiff's state law claims (Dkt. No. 8), on the ground that Plaintiff concedes her state law claims are preempted by ERISA as a matter of law.

3. Defendant requests that the Court deny, **without prejudice**, that portion of Defendant's motion to dismiss that asserts Plaintiff's claim would be barred, if re-characterized as a claim for benefits pursuant to 29 U.S.C. § 1132(a)(1)(B) of ERISA, because of the Policy's contractual limitation of actions provision, subject to Defendant's continued right to assert this defense in answer to the Complaint.

4. Defendant requests that the Court re-characterize the Complaint as asserting a claim pursuant to 29 U.S.C. § 1132(a)(1)(B) of ERISA that is limited to the relief available thereunder, or, in the alternative, allow Plaintiff thirty days to submit a proposed amended complaint specifically conforming her assertions and requests for relief thereunder.

Respectfully submitted,

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This 15th day of October, 2010

4851-0480-0519, v. 1

CERTIFICATE OF SERVICE

I, Michael G. Gallaway, hereby certify that on October 15, 2010, I electronically filed **DEFENDANT'S REPLY TO PLAINTIFF'S MEMORANDUM IN RESPONSE TO DEFENDANT'S MOTIONS TO DISMISS AND TO STRIKE** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record.

I further certify that on the same date, October 15, 2010, a copy of **DEFENDANT'S REPLY TO PLAINTIFF'S MEMORANDUM IN RESPONSE TO DEFENDANT'S MOTIONS TO DISMISS AND TO STRIKE** was served upon the following counsel of record via United States mail, postage prepaid, addressed as follows:

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/s/ Michael G. Gallaway
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